

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER CHARLES CLARK,

Plaintiff,

v.

FIDEL GUTIERREZ, et al.,

Defendants.

Case No. 1:21-cv-01386-JLT-EPG (PC)

ORDER DIRECTING DEFENDANT TO
FILE ANSWER WITHIN SEVEN DAYS

(ECF No. 32)

ORDER OPENING DISCOVERY ONLY
ON THE ISSUE OF EXHAUSTION OF
AVAILABLE ADMINISTRATIVE
REMEDIES

On March 13, 2023, the Court granted in part Defendants' second motion for an extension of the responsive pleading deadline, giving Defendants until April 10, 2023, to file their responsive pleading. (ECF No. 32). The Court warned Defendants that no further extensions of this deadline would be granted. (*Id.* at 2). On April 10, 2023, Defendants filed a motion for summary judgment (ECF No. 33), but they did not file a responsive pleading.

While serving a motion pursuant to Federal Rule of Civil Procedure 12(b) can extend the deadline for filing for a responsive pleading, Fed. R. Civ. P. 12(a)(4)(A), filing a motion for summary judgment does not. Accordingly, the Court will require Defendants to file a responsive pleading, and will give them seven days to do so. If Defendants fail to do so, Plaintiff may move for entry of default.

Additionally, as Defendants have filed a motion for summary judgment on the issue of exhaustion, the Court will open discovery only on the issue of exhaustion of administrative

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remedies.¹

Accordingly, based on the foregoing, IT IS ORDERED that:

1. Defendants have seven days from the date of service of this order to file their responsive pleading. If Defendants fail to file their responsive pleading by this deadline, Plaintiff may move for entry of default.
2. If Plaintiff needs additional time to file his opposition to the motion for summary judgment so that he can take discovery, Plaintiff may file a motion for an extension of time.
3. Discovery is open only on the issue of exhaustion of administrative remedies.
4. The parties may take the following types of discovery from other parties:
 - a. Interrogatories (an interrogatory is a written question or request for information and “may relate to any matter that may be inquired into under Rule 26(b).” Fed. R. Civ. P. 33(a)(2));
 - b. Requests for Production (a request for production is a written request that the opposing party produce documents or electronically stored information, “including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations,” or a written request that the opposing party produce any designated tangible things. Fed. R. Civ. P. 34(a)(1));
 - c. Requests for Admissions (a request for admission is a written request that the opposing party “admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1)” that relate to “(A) facts, the application of law to fact, or opinions about either; [or] (B) the genuineness of any described documents.” Fed. R. Civ. P. 36(a)(1)); and

¹ Defendants have contacted ADR Coordinator Sujean Park to schedule a settlement conference, and, as the Court previously informed the parties, “[i]f the case proceeds to a settlement conference, the Court will not schedule the case until after the settlement conference is held.” (ECF No. 27, p. 2 n.2).

1 d. Depositions (a deposition is where one party (or that party's counsel)
2 questions someone under oath, and a court reporter is present to record
3 the proceedings).²

4 i. Pursuant to Federal Rule of Civil Procedure 30(a)(2)(B),
5 Defendant(s) may depose any witness confined in a prison on the
6 condition that, at least fourteen (14) days before such a
7 deposition, Defendant(s) serve all parties with the notice required
8 by Federal Rule of Civil Procedure 30(b)(1). Plaintiff's failure to
9 participate in a properly noticed deposition could result in
10 sanctions against Plaintiff, including monetary sanctions and/or
11 dismissal of this case. Pursuant to Federal Rule of Civil
12 Procedure 30(b)(4), the parties may take any deposition under
13 this section by video conference without a further motion or order
14 of the Court, relieving the court reporter of the requirement to be
15 in the physical presence of the witness under Federal Rule of
16 Civil Procedure 28(a)(1) during that deposition.

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18 ii. If Plaintiff wishes to take a deposition, Plaintiff must file a
19 motion requesting permission to do so, specifically showing the
20 ability to comply with the applicable Federal Rules of Civil
21 Procedure by providing the name of the person to be deposed, the
22 name and address of the court reporter who will take the
23 deposition, the estimated cost for the court reporter's time and the
24 recording, and the source of funds for payment of that cost.
25 Plaintiff bears the responsibility to pay the costs of the
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28 ² "Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim." Fed. R. Civ. P. 30(c)(3).

deposition, including the cost of copies of deposition transcript(s).³

5. A party may serve on any other party no more than 10 interrogatories, 10 requests for production of documents, and 10 requests for admission at this time. If a party wishes to serve additional discovery requests, that party may file a motion for additional discovery requests with the Court, explaining why additional discovery requests are necessary.
6. Discovery requests and responses should be sent to the opposing part(ies), or their counsel if represented. They should not be filed with the Court.
7. Responses to written discovery requests shall be due **forty-five (45) days** after the request is first served. Boilerplate objections are disfavored and may be summarily overruled by the Court. Responses to document requests shall include all documents within a party's possession, custody, or control. Fed. R. Civ. P. 34(a)(1). Documents are deemed to be within a party's possession, custody, or control if the party has actual possession, custody, or control thereof, or the legal right to obtain the property on demand. If Defendant(s) cannot obtain documents from Plaintiff's institution(s) of confinement, Defendant(s) shall clearly respond that a third party subpoena will be necessary to obtain documents from Plaintiff's institution(s) of confinement.
8. If any party or third party withholds a document on the basis of privilege, that party or third party shall provide a privilege log to the requesting party identifying the date, author, recipients, general subject matter, and basis of the privilege within thirty (30) days after the date that responses are due. Failure to provide a privilege log within this time shall result in a waiver of the privilege. Additionally, if a party is claiming a right to withhold witness statements and/or

³ The Court may request input from Plaintiff's institution of confinement to determine if the deposition(s) can proceed in a safe and secure manner before ruling on a motion for a deposition.

evidence gathered from investigation(s) into the incident(s) at issue in the complaint based on the official information privilege or confidentiality, the withholding party shall submit the withheld witness statements and/or evidence to the Court for *in camera* review, along with an explanation of why the witness statements and/or evidence should be withheld.⁴ The witness statements and/or evidence shall be Bates stamped, and mailed to Judge Grosjean at 2500 Tulare Street, Sixth Floor, Fresno, CA 93721. The withholding party shall also file and serve a notice that they have complied with this order. All other claims of privilege may be challenged via a motion to compel.

9. If Plaintiff seeks documents from someone who is not a party in this case, Plaintiff must file a request for the issuance of a subpoena *duces tecum* with the Court. In any request for a subpoena, Plaintiff must: (1) identify the documents sought and from whom; (2) explain why the documents are relevant to the claims in this case; and (3) make a showing in the request that the records are only obtainable through a third party. If the Court approves the request, it may issue Plaintiff a subpoena *duces tecum*, commanding the production of documents from a non-party, and may command service of the subpoena by the

⁴ See *Woodford v. Ngo*, 548 U.S. 81, 94-95 (2006) (“[P]roper exhaustion improves the quality of those prisoner suits that are eventually filed because proper exhaustion often results in the creation of an administrative record that is helpful to the court. When a grievance is filed shortly after the event giving rise to the grievance, witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved.”).

The “common law governmental privilege (encompassing and referred to sometimes as the official or state secret privilege) . . . is only a qualified privilege, contingent upon the competing interests of the requesting litigant and subject to disclosure. . . .” *Kerr v. U.S. Dist. Ct. for N. Dist. of Cal.*, 511 F.2d 192, 198 (9th Cir. 1975) (citations omitted). The Ninth Circuit has since followed *Kerr* in requiring *in camera* review and a balancing of interests in ruling on the government’s claim of the official information privilege. See, e.g., *Breed v. U.S. Dist. Ct. for N. Dist. of Cal.*, 542 F.2d 1114, 1116 (9th Cir. 1976) (“[A]s required by *Kerr*, we recognize ‘that in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege.’”) (quoting *Kerr v. U. S. Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 406 (1976)); *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033-34 (9th Cir. 1990), *as amended on denial of reh’g* (Feb. 27, 1991), *as amended on denial of reh’g* (May 24, 1991) (“Government personnel files are considered official information. To determine whether the information sought is privileged, courts must weigh the potential benefits of disclosure against the potential disadvantages. If the latter is greater, the privilege bars discovery.”) (citations omitted).

United States Marshals Service. Fed. R. Civ. P. 45; 28 U.S.C. § 1915(d).

However, the Court will consider granting such a request *only if* the documents sought from the non-party are not obtainable from Defendant(s) through a Rule 34 request for production of documents.

10. The parties are required to act in good faith during the course of discovery and the failure to do so may result in the payment of expenses pursuant to Federal Rule of Civil Procedure 37(a)(5) or other appropriate sanctions authorized by the Federal Rules of Civil Procedure or the Local Rules.

11. The parties have permission to file motions to compel further discovery responses. Any such motion should include a copy of the request(s) and any response to the request(s) at issue. The responding party may file a response to the motion no later than twenty-one days from the date the motion is filed. If, after reviewing the motion(s) and response(s), the Court determines that a hearing will be helpful, the Court will set a hearing on the motion(s) to compel.

IT IS SO ORDERED.

Dated: April 11, 2023

/s/ Eric P. Grogan
UNITED STATES MAGISTRATE JUDGE